

Juvenile Court Jurisdiction Over Noncriminal Misbehavior: The Argument Against Abolition

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I. INTRODUCTION

During the last decade and a half, there has been significant recognition of the legal rights of children and increasing attention to the law governing those rights. In addition to voluminous law review literature¹ and treatment in texts,² the United States Supreme Court, lower federal courts, and the state courts have addressed issues relating to children's rights in an expanding number of cases. Among the areas that the courts have scrutinized are children's freedom of expression under the first amendment of the Constitution of the United States,³ hearing requirements before a student may be suspended from a public school⁴ or subjected to a disciplinary transfer,⁵ the rights of students summarily expelled from schools to sue for damages,⁶ corporal punishment of students,⁷ free access by minors to contraceptive devices,⁸ the right of a child to secure an abortion without parental consent,⁹ and the right of a minor to a hearing before commitment to a state mental hospital.¹⁰

At the same time, there has been a parallel stream of legal

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I am grateful for the research assistance of Lois Campbell, a member of the class of 1979, Hofstra University School of Law.

1. See, e.g., Burt, *Developing Constitutional Rights of, in, and for Children*, 39 LAW & CONTEMP. PROB. 118 (1975); *Children and the Law—A Symposium*, 20 CATH. LAW. 85 (1974); Foster & Freed, *A Bill for the Rights for Children*, 6 FAM. L. Q. 343 (1972); Geiser, *The Rights of Children*, 28 HASTINGS L.J., 1027 (1977); Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y. L. REV. 605; Wald, *Making Sense Out of the Rights of Youth*, 4 HUMAN RIGHTS 13 (1974).

2. See, e.g., P. ADAMS, *CHILDREN'S RIGHTS—TOWARD LIBERATION OF THE CHILD* (1971); *CHILDREN'S LIBERATION* (D. Gottleib ed. 1972); L. COLE, *OUR CHILDREN'S KEEPERS—INSIDE AMERICA'S KID PRISONS* (1972); R. FARSON, *BIRTHRIGHTS* (1974); H. FOSTER, JR., *A BILL OF RIGHTS FOR CHILDREN* (1974); J. HOLT, *ESCAPE FROM CHILDHOOD* (1974); M. PAULSEN, *THE PROBLEMS OF JUVENILE COURTS AND THE RIGHTS OF CHILDREN* (1975); *THE RIGHTS OF CHILDREN: EMERGENT CONCEPTS IN LAW AND SOCIETY* (A. Wilkerson ed. 1973).

3. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

4. *Goss v. Lopez*, 419 U.S. 565 (1975).

5. *Everett v. Marcuse*, 426 F. Supp. 397 (E.D. Pa. 1977).

6. *Wood v. Strickland*, 420 U.S. 308 (1975).

7. *Baker v. Owen*, 395 F. Supp. 294 (M.D. N.C. 1975), *aff'd mem.*, 423 U.S. 907 (1975); *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1976).

8. *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977).

9. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976).

10. *Bartley v. Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated*, 431 U.S. 119 (1977); *J.L. v. Parham*, 412 F. Supp. 112 (M.D. Ga.), *stay granted*, 425 U.S. 909 (1976), *prob. juris. noted*, 431 U.S. 936 (1977).

commentary relating to children who are the objects of the juvenile justice system,¹¹ and a series of United States Supreme Court holdings defining the procedural due process rights of children charged with and tried for conduct that would be criminal if committed by an adult. More than a quarter of a century ago, in *Haley v. Ohio*,¹² the Court first significantly addressed the juvenile justice system when it held that the fourteenth amendment made inadmissible the coerced confession of a fifteen-year-old boy.¹³ Major due process underpinnings for the juvenile justice system were first established in *Kent v. United States*,¹⁴ in which the Court held that in view of the procedural protections and benefits to the child that inhered in juvenile court jurisdiction, waiver of jurisdiction and transfer of the proceeding to an adult court could not be accomplished without a hearing that comported with constitutional due process.

A year later, in *In re Gault*,¹⁵ the Court decided the first of an important trio of cases that have defined the constitutional due process perimeters of the juvenile delinquency jurisdiction of juvenile courts. *Gault* held that in a juvenile court proceeding in which a youth may be committed to an institution, due process requires adequate notice of the charges, the right to counsel and the right to confrontation, cross-examination and to the constitutional privilege against self-incrimination. The Court's second major pronouncement was in *In re Winship*,¹⁶ which held that proof beyond a reasonable doubt in juvenile delinquency proceedings was no less a due process requirement than the safeguards enunciated in *Gault*. Finally, the Court departed somewhat abruptly from what had been an expanding recognition of due process rights of juveniles when it held in *McKeiver v. Pennsylvania*¹⁷ that the fourteenth amendment did not require the states to afford jury trials in the adjudicative stage of juvenile court delinquency proceedings. As a result of *Gault*, *Winship*, and *McKeiver*, the law appears to be reasonably well settled with respect

11. See, e.g., F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* (1964); Gardner, *The Kent Case and The Juvenile Court: A Challenge to Lawyers*, 52 A.B.A.J. 923 (1966); Ketcham, *The Legal Renaissance in the Juvenile Court*, 60 NW. U.L. REV. 585 (1965); Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CALIF. L. REV. 694 (1966); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281 (1967).

12. 332 U.S. 596 (1948).

13. Although *Haley* concerned the admissibility of the confession in a state court of general jurisdiction, rather than a juvenile court, the age of the defendant was a critical element in the Court's holding. Mr. Justice Douglas, writing for the Court, observed that

what transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity.

Id. at 599.

14. 484 U.S. 541 (1966).

15. 387 U.S. 1 (1967).

16. 397 U.S. 358 (1970).

17. 403 U.S. 528 (1971).

to the constitutional protections required in juvenile delinquency proceedings.¹⁸

Recently, the focus of attention has shifted to children's noncriminal misbehavior, which is subject to the jurisdiction of the juvenile courts through statutes proscribing such conduct as truancy, running away from home, incorrigibility, ungovernability or waywardness, leading an idle or dissolute life, or being beyond parental control or habitually disobedient.¹⁹ The courts' exercise of this jurisdiction has been subjected to several lines of attack. Critics charge that statutory definitions of the behavior or circumstances that trigger juvenile court jurisdiction over noncriminal misbehavior of children are hopelessly vague and overbroad,²⁰ that the exercise of the jurisdiction unconstitutionally punishes a status,²¹ that an adjudication under the applicable statutes labels and "stigmatizes" the respondent child,²² and that exercise of the jurisdiction is an example of racial and economic discrimination.²³ In sum, critics argue that the assertion of jurisdiction by juvenile courts over noncriminal misbehavior of children is not only fraught with constitutional problems, but also fails to serve any legitimate interest of the state and is not a valid exercise of the state's power. These attacks have culminated in the demand that the jurisdiction be abolished in order that children who engage in conduct that would not be criminal if committed by an adult would be free of the coercive power of the juvenile courts.²⁴

These attacks and the demand for abolition are misguided. The juvenile courts should retain their jurisdiction over certain statutorily proscribed noncriminal misbehavior by children. The reasons supporting retention are clear and may be briefly summarized. First, the abolitionist

18. See also *Breed v. Jones*, 421 U.S. 519 (1975), which held that juvenile delinquency proceedings place a child "in jeopardy" within the meaning of the double jeopardy clause of the fifth amendment.

19. See notes 28-40 and accompanying text *infra*.

20. See notes 41-89 and accompanying text *infra*.

21. See notes 90-101 and accompanying text *infra*.

22. See notes 123-41 and accompanying text *infra*.

23. See notes 160-66 and accompanying text *infra*.

24. See, e.g., INSTITUTE OF JUDICIAL ADMINISTRATION AND THE AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR (Tent. Draft 1977) [hereinafter cited as IJA-ABA STANDARDS, NONCRIMINAL MISBEHAVIOR]; NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION, REPORT OF THE TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARD 9.1 (1976); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 573 (1973); SHERIDAN & BEASOR, MODEL ACTS FOR FAMILY COURTS AND STATE-LOCAL CHILDREN'S PROGRAMS 14 (1975); Bazelon, *Beyond Control of the Juvenile Court*, 21 JUV. CT. J. 42 (1970); Couch, *Diverting The Status Offender From the Juvenile Court*, 25 JUV. JUST. 18 (1974); Gilman, *How to Retain Jurisdiction Over Status Offenses, Changes Without Reform in Florida*, 22 CRIME & DELINQUENCY 48 (1976); Board of Directors, National Council on Crime and Delinquency, *Jurisdiction Over Status Offenses Should Be Removed From the Juvenile Court, A Policy Statement*, 21 CRIME & DELINQUENCY 97 (1975); Stiller & Elder, *PINS—A Concept in Need of Supervision*, 12 AM. CRIM. L. REV. 33 (1974); Weiss, *The Poor Kid*, 9 DUQ. L. REV. 590 (1971); Comment, *The Status Offender and the Juvenile Court*, 12 WILLIAMETTE L.J. 557 (1976); Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 138 (1974).

proposals strike at the heart of the family autonomy tradition, which is reflected in other statutes and judicial pronouncements relating to child-adult relationships.²⁵ Second, although some critics charge that statutes proscribing noncriminal misbehavior by children discriminate unlawfully against poor and minority groups, abolition may work to perpetuate such discrimination. Third, proponents of abolition have not devised or proposed truly realistic alternative approaches that will resolve the serious societal problems which are now addressed by the existing statutes; indeed, abolition is likely to give rise to a set of problems which could well make the cure worse than the disease.²⁶ I do not suggest that the exercise of juvenile court jurisdiction over children's noncriminal misbehavior has been free of abuse, but continued efforts toward reform may go some distance toward alleviating the more egregious abuses. To focus attention on abolition rather than reform is a serious mistake.

Part II of this article will briefly outline the statutory scheme that addresses noncriminal misbehavior by children. Part III will identify the major criticisms of the jurisdiction and indicate why I believe the arguments for abolition are misdirected. Finally, in Part IV I will suggest reasons for the retention of juvenile court jurisdiction over noncriminal misbehavior as a proper exercise of state power in the area of juvenile justice.

II. THE STATUTORY SCHEME

The earliest juvenile court statutes²⁷ encompassed both noncriminal misbehavior and conduct that would be criminal if engaged in by an adult. The first Juvenile Court Act,²⁸ enacted by the Illinois legislature in 1899, was limited in its coverage to dependent or neglected children and delinquent children. The latter were defined as children under sixteen years of age who were in violation of any state law or city or village ordinance.²⁹ By 1905, however, Illinois had amended the statute to include within its definition of delinquency "incurability" and a broad spectrum of other behavior deemed immoral.³⁰

25. See notes 142-59 and accompanying text *infra*.

26. See text accompanying notes 167-94 *infra*.

27. The history of the juvenile court and the philosophy of the juvenile court movement are treated in varying detail and with somewhat differing interpretations in A. PLATT, *THE CHILD SAVERS—THE INVENTION OF DELINQUENCY* (1969); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: *JUVENILE DELINQUENCY AND YOUTH CRIME* (1967); Rosenheim, *Perennial Problems In The Juvenile Court*, in *JUSTICE FOR THE CHILD* (M. Rosenheim ed. 1962); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 *STAN. L. REV.* 1187 (1969); Parker, *The Juvenile Court Movement: The Illinois Experience*, 26 *U. TORONTO L. J.* 253 (1976).

28. Act of April 21, 1899, 1899 Ill. Laws 131.

29. *Id.* § 1.

30. Act of May 16, 1905 Ill. Laws 153. The amended definition provided in pertinent part: The words delinquent child shall include any male under the age of seventeen years or any

Modern statutes that give juvenile courts jurisdiction over noncriminal misconduct by minors generally take two forms. The first of these adheres to the scheme of the early Illinois enactments and includes noncriminal conduct within the definition of delinquency. Thus, for example, Delaware's Family Court Act provides that a delinquent child "means a child who commits an act which if committed by an adult would constitute a crime, or, who is uncontrolled by his custodian or school authorities or who habitually so deports himself as to injure or endanger the morals or health of himself or others."³¹ Similarly, some states, without using labels such as "delinquent" or "ungovernable," group together within the jurisdiction of the juvenile court children who commit criminal acts and children who are guilty of noncriminal misbehavior.³²

The second type of statute that proscribes noncriminal misbehavior by juveniles has as its prototype the New York statute that was enacted in 1962.³³ The New York law distinguishes between the "juvenile delinquent," defined as "[a] person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime," and the "person in need of supervision," defined as

[a] male less than sixteen years of age and a female less than eighteen years of age who does not attend school in accordance with the provisions of part one of article sixty-five of the education law or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority or who violates the provisions of section 221.05 of the penal law.³⁴

Although some states have purported to curtail sharply³⁵ juvenile court jurisdiction over noncriminal misbehavior by minors, such jurisdiction persists intact in the vast majority of the states under various labels.

female child under the age of eighteen years who violates any law of this State or any city or village ordinance; or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who, without just cause and without the consent of its parents or custodians, absents itself from its home or place of abode, or who is growing up in idleness or crime; or who knowingly frequents a house of ill-repute; or who knowingly frequents any policy shop or place where any gambling device is operated; or who frequents any saloon or dram shop where intoxicating liquors are sold; or who patronizes or visits any public pool room or bucket shop, or who wanders about the streets in the night time without being on any lawful business or occupation; or who habitually wanders about any railroad yards or tracks or jumps or attempts to jump onto any moving train; or enters any car or engine without lawful authority; or who habitually uses vile, obscene, vulgar, profane or indecent language; or who is guilty of immoral conduct in any public place or about any school house

31. DEL. CODE tit. 10, § 901(7) (1974).

32. See, e.g., OR. REV. STAT. § 419-76 (1977).

33. N.Y. FAM. CT. ACT (29A) § 712 (McKinney Supp. 1977). Prior to the 1962 legislation, the New York provisions were set out in its Children's Court Act which, as enacted in 1922, included within its definition of juvenile delinquency violations of law and criminal conduct, as well as incorrigibility, ungovernability and habitual disobedience or truancy, leaving home without parental consent, and habitual use of obscene or profane language. 1922 N.Y. Laws ch. 547.

34. N.Y. FAM. CT. ACT (29A) § 712(a), (b). Section 221.05 of the New York Penal Law proscribes the unlawful possession of marihuana. N.Y. PENAL LAW § 221.05 (McKinney Supp. 1977).

35. See CAL. WELF. & INST. CODE § 601 (West Supp. 1977); IOWA CODE ANN. § 232.2 (West Supp. 1978); TEX. FAM. CODE ANN. tit. 3, § 51.02-.03 (Vernon Supp. 1978).

These include Persons in Need of Supervision (PINS),³⁶ the original New York designation, Minors Otherwise in Need of Supervision (MINS),³⁷ Child in Need of Supervision (CINS),³⁸ Youth in Need of Supervision (YINS),³⁹ and Child in Need of Assistance.⁴⁰ In this article I shall use the most common legend, PINS, to refer to the subject jurisdiction.

III. THE ATTACKS ON PINS JURISDICTION: ARGUMENTS FOR ABOLITION

A. *Vagueness*

Critics have charged that statutes conferring PINS jurisdiction on juvenile courts are unconstitutionally vague in that they not only fail to provide adequate notice to the respondent minors of the conduct proscribed, but also are susceptible to arbitrary and discriminatory enforcement.⁴¹ This conclusion, however, is not entirely supported by either the decisions of the United States Supreme Court striking down vague statutes in other contexts or the vast majority of state court decisions which have addressed the precise issue. More importantly, even though there may be statutory definitions of PINS against which the charge of vagueness ought to be sustained, it does not follow that the total abolition of the PINS jurisdiction of juvenile courts is warranted.

The test for the constitutionally required due process element of notice was set forth by the Supreme Court more than one-half century ago in *Connally v. General Construction Co.*,⁴² in which the Court observed that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law".⁴³

Later, the Court reaffirmed this principle in *Musser v. Utah*,⁴⁴ and recently it summarized the vices encompassed by vague statutes in *Grayned v. City of Rockford*:⁴⁵

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.

36. N.Y. FAM. CT. ACT (29A) § 712 (McKinney Supp. 1977).

37. ILL. ANN. STAT. ch. 37, § 702-03 (Smith-Hurd 1972).

38. *E.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 3-801(f) (Supp. 1977).

39. MONT. REV. CODES ANN. § 10-1203(14) (Supp. 1977).

40. IOWA CODE ANN. § 232.2(13) (West Supp. 1978).

41. See IJA-ABA STANDARDS, NONCRIMINAL MISBEHAVIOR, *supra* note 24, at 8; Rosenberg & Rosenberg, *The Legacy of the Stubborn and Rebellious Son*, 74 MICH. L. REV. 1097, 1124 (1976).

42. 269 U.S. 385 (1926).

43. *Id.* at 391.

44. 333 U.S. 95 (1948).

45. 408 U.S. 104 (1972).

Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. . . .⁴⁶

Although there is considerable variation in the language of PINS statutes, the provisions may be divided into three general categories for the purpose of examining the vagueness attacks. First, a number of statutes specifically prohibit truancy or habitual truancy, and absence from home without parental permission; that is, running away.⁴⁷ A second category of proscribed conduct is described in terms such as ungovernability, incorrigibility or habitual disobedience of reasonable parental directions.⁴⁸ Finally, there is a kind of catch-all category which condemns "leading an idle, dissolute, lewd, or immoral life," or proscribes behavior "endangering the morals, health, or general welfare" of the respondent child.⁴⁹ Before accepting the broad proposition that PINS statutes "are almost invariably impermissibly vague in wording and overbroad in scope,"⁵⁰ it may be helpful to examine the statutes in light of the particular categories of behavior proscribed and the pronouncements of the courts relating to vagueness.

The infrequency of vagueness challenges to the first category of PINS provisions suggests that the proscription of "habitual truancy" is very clear and gives fair warning of the type of conduct that is prohibited. When such language has been attacked as vague, courts have had little difficulty in sustaining the constitutionality of the provisions. In *Sheehan v. Scott*,⁵¹ for example, a fourteen-year old plaintiff sought to enjoin on vagueness grounds the enforcement of a provision of the Illinois PINS statute which included within its definition of minors otherwise in need of supervision children subject to the state's compulsory education law who were "habitually truant." The plaintiff, who had been absent for eleven of nineteen school days, challenged as unconstitutionally vague both the word "truant" and the word "habitual." The Seventh Circuit affirmed the

46. *Id.* at 108-09 (footnotes omitted). The Court added that a third, but related, constitutional defect of vague statutes exists when the statute "abuts upon sensitive areas of basic First Amendment freedoms, [and] operates to inhibit the exercise of those freedoms." *Id.*

47. See, e.g., FLA. STAT. ANN. § 39.01 (West Supp. 1977); ME. REV. STAT. tit. 15, § 2552 (West Supp. 1976).

48. See, e.g., N.Y. FAM. CT. ACT (29A) § 712 (McKinney Supp. 1977); PA. STAT. ANN. tit. 11, § 50-102(4) (Purdon Supp. 1978).

49. See, e.g., OHIO REV. CODE ANN. § 2151.022(c) (Page 1976). New Jersey includes a similar provision as "[e]vidence of conduct which is ungovernable or incorrigible." N.J. STAT. ANN. § 2A:4-45(d)(2), (5) (West Supp. 1977). It should be noted that more often than not, all of the categories described above are found in a single statute.

50. IJA-ABA, STANDARDS, NONCRIMINAL MISBEHAVIOR, *supra* note 24, at 8.

51. 520 F.2d 825 (7th Cir. 1975).

order of the District Court dismissing the complaint for its failure to present a substantial constitutional question and observed that the word "truant" should be given its common ordinary meaning, and that the word "habitual" had a well-defined meaning under the case law of the jurisdiction. Similarly, a vagueness attack on the New York Family Court Act, which included "habitual truant" within the definition of PINS, was also summarily rejected.⁵² Thus one may reasonably believe that the paucity of cases involving attacks on the truancy element of PINS statutes reflects the fact that the statutes are not only clear, but that the provisions do not impinge upon the values which the void-for-vagueness doctrine protects.⁵³

Far more troublesome as unconstitutionally vague is what I have described as the third category of PINS statutes.⁵⁴ A typical provision of this variety was challenged on constitutional vagueness grounds in *E.S.G. v. State*,⁵⁵ in which the appellant had been adjudicated delinquent and committed to a state training school under a section of the Texas Juvenile Act which, at the time, defined as a delinquent child one who "habitually so deports himself as to injure or endanger the morals or health of himself or others."⁵⁶ In a brief and questionable opinion, the court found the challenged section of the statute not to be unconstitutionally vague, and asserted merely that the word "morals" was in constant popular use and conveyed concrete impressions to the ordinary person and that thirty-three states had enacted similar statutes permitting delinquency adjudications for immoral conduct.⁵⁷ A virtually identical response was made by the Appellate Division of the New Jersey Superior Court in *State v. L.N.*,⁵⁸ in which the statutory language under attack included within the definition of juvenile delinquency "[g]rowing up in idleness or delinquency,"⁵⁹ and "[d]eportment endangering the morals, health or general welfare of [the] child."⁶⁰ Again, without the barest reference to the Supreme Court's constitutional pronouncements on vagueness and by relying on authorities

52. *In re Mario*, 65 Misc. 2d 708, 317 N.Y.S.2d 659 (Fam. Ct. 1971). The court observed that [w]hile the statutory definition of a PINS as an "habitual truant" may lack mathematical precision, there is no violation of due process in its application herein nor in the customary manner of its application by this court. As in the instant case, the established procedure of the Family Court in truancy cases is first to place the child on parole or probation in the community, imposing specific requirements as to regular school attendance (as well as requirements in aid thereof such as a night-time curfew); placement is effected only if such specific conditions are disobeyed. Thus, respondent had adequate notice and warning of specific directions to be obeyed to avoid placement.

65 Misc. 2d at 715, 317 N.Y.S. 2d at 666 (footnotes omitted).

53. See text accompanying notes 42-46 *supra*.

54. See note 49 and accompanying text *supra*.

55. 447 S.W.2d 225 (Tex. Ct. App. 1969), *cert. denied*, 398 U.S. 956 (1970).

56. TEX. REV. CIV. STAT. ANN. art. 2338-1, § 3(f) (Vernon 1971). The Texas statute has since been amended to remove the offensive language. See TEX. FAM. CODE ANN. tit. 3, § 51.03(b) (Vernon Supp. 1978).

57. 447 S.W. 2d at 226.

58. 109 N.J. Super. 278, 263 A.2d 150 (1970).

59. N.J. STAT. ANN. § 2A:4-14(i) (West 1952).

60. N.J. STAT. ANN. § 2A:4-14(m) (West 1952).

from other jurisdictions approving similar juvenile delinquency statutes, the court found no constitutional infirmity.⁶¹

Despite the apparent willingness of some courts to uphold the broadest and most general PINS provisions, there have recently been significant departures from this trend. At issue in *Gonzalez v. Mailliard*⁶² was an allegedly unconstitutional statute that subjected to adjudication as a ward of the court a child "who from any cause is in danger of leading an idle, dissolute, lewd, or immoral life."⁶³ The court struck down this statute, for it saw no significant distinction between this language and similar language in adult vagrancy statutes that had been found unconstitutionally vague by a number of federal courts.⁶⁴ The court pointed out that an adjudication under the California statute could result in both serious deprivation of freedom and the attachment of social stigma, and that two further reasons for disapproving the statute existed. First, the procedural due process rights recognized in *In re Gault*⁶⁵ would be useless to a defendant faced with charges in the vague language of the statute. Second, the state could easily avoid the "proof beyond a reasonable doubt" standard set out in *In re Winship*⁶⁶ by the mere device of substituting a charge and proof of "potentially immoral conduct of life" in instances in which conduct which would be criminal for an adult could not be proved.⁶⁷

Although New York's Wayward Minor statute was a part of the state's Code of Criminal Procedure and not technically a PINS provision, it was held in part unconstitutionally vague in *Gesicki v. Oswald*⁶⁸ for reasons closely akin to those expressed in *Gonzalez v. Mailliard*. The statutory language challenged in *Gesicki* included within the definition of wayward minor a child who was "morally depraved or in danger of becoming morally depraved."⁶⁹ The court applied the vagueness standard

61. See also *S**** S**** v. State*, 299 A.2d 560 (Me. 1973), upholding the constitutionality of ME. REV. STAT. tit. 15, § 2552 (1965), which authorized adjudication as a juvenile offender a child "living in circumstances of manifest danger of falling into habits of vice or immorality."

62. No. 50424 (N.D. Cal. Feb. 9, 1971) (three-judge court) *vacated and remanded*, 416 U.S. 918 (1974). The text of this unreported case appears as an appendix to a recent comment on the case, Roybal, *Void for Vagueness: State Statutes Proscribing Conduct Only For a Juvenile*, 1 PEPPERDINE L. REV. 1 (1973).

63. CAL. WELF. & INST. CODE § 601 (West 1966) (amended 1975)

64. Subsequent to the *Gonzalez* decision, the United States Supreme Court also addressed an adult vagrancy statute and found it to be unconstitutional. *Papachristou v. Jacksonville*, 405 U.S. 156 (1972).

65. 387 U.S. 1 (1967).

66. 397 U.S. 358 (1970).

67. Roybal, *supra* note 62, at 19.

68. 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd mem.*, 406 U.S. 913 (1972). See generally Comment, *Juvenile Statutes and Noncriminal Delinquents: Applying The Void-for Vagueness Doctrine*, 4 SETON HALL L. REV. 184 (1972).

69. N. Y. CODE CRIM. PROC. § 913-a (McKinney 1945).

in *Connally*⁷⁰ and found the indicted language "far beyond the bounds of permissible ambiguity in a standard defining a criminal act."⁷¹

I have suggested thus far that those provisions of PINS statutes which proscribe truancy, or in some cases habitual truancy, and running away from home are not vague. They have rarely been challenged on constitutional vagueness grounds, and no case has been found in which such a provision was invalidated. The "catchall" or "omnibus" provisions of PINS or PINS-type statutes, on the other hand, have been held to be unconstitutionally vague in the better reasoned cases. I come now to what I have described as the second category of PINS proscriptions, which are found in statutes cast in terms such as ungovernability, incorrigibility and beyond parental control.⁷² Although such provisions have been attacked frequently as vague, state courts have generally found little difficulty in sustaining the statutes and denying relief. It ought to be conceded, however, that some of the decisions reaching this result are at best questionable. In *In re Jackson*,⁷³ a Washington appellate court sustained a statute that defined an "incorrigible" child as one "who is beyond the control and power of his parents, guardian, or custodian by reason of the conduct or nature of said child."⁷⁴ The court initially observed that not every prohibited act need be spelled out so long as the general terms of a statute are understandable and found that the language in question gave fair notice to the child because "[c]hildren of ordinary understanding know that they must obey their parents or those persons lawfully standing in a parent's place."⁷⁵ Similarly, *In re Napier*⁷⁶ involved a claim of lack of notice sufficient to satisfy constitutional due process requirements when appellant was charged under the portion of the Oklahoma PINS statute which defined a child in need of supervision as one "who is beyond the control of his parents, guardian or other custodian"⁷⁷ The court rejected appellants claim, but simply cited a long line of cases from other jurisdictions upholding a variety of PINS statutes to justify its conclusion that the language was not vague. Nowhere in its opinion did the court address squarely appellant's contention that the statute failed to give notice of what conduct was proscribed or to provide standards for inferior courts.

70. See text accompanying note 43 *supra*.

71. 336 F. Supp. at 374. The *Gesicki* court, citing *Robinson v. California*, 370 U.S. 660 (1962), also held that use of the term "morally depraved" in the statute unconstitutionally permitted punishment of a status or condition. *Id.* at 376 n.6. For a discussion of and response to the frequent assertion that PINS statutes unconstitutionally punish the status of childhood, see text accompanying notes 90-101 *infra*.

72. See text accompanying note 48 *supra*.

73. 6 Wash. App. 962, 497 P.2d 259 (1972).

74. WASH. REV. CODE ANN. § 13.04.010(7) (1962).

75. *In re Jackson*, 6 Wash. App. 962, 964, 497 P.2d 259, 261 (1972).

76. 532 P.2d 423 (Okla. 1975).

77. OKLA. STAT. ANN. tit. 10, § 1101(c) (West Supp. 1974).

More persuasive are those opinions that have read incorrigibility more narrowly or have upheld such provisions when they are more narrowly drafted. In *Blondheim v. State*,⁷⁸ for example, the Supreme Court of Washington considered the same language which had previously been upheld in *Jackson*. Although the court simply relied on *Jackson* for its conclusion that the statute was not vague, the Court addressed the closely related question of overbreadth and observed that the statute embraced within its proscription only the lawful demands of parents. In so limiting the breadth of the statute, the court pointed out that "[i]mplicit in the concept of parental control is the idea that parents' control will be lawful. Any other interpretation would reduce the statute to an absurdity."⁷⁹ The same result has been reached when the definition of incorrigibility was more narrowly phrased in the statute itself to encompass disobedience of only lawful and reasonable commands of a parent or guardian.⁸⁰

The foregoing discussion of vagueness principles in connection with PINS provisions suggests a remedy short of the radical step of total removal of PINS cases from the jurisdiction of the juvenile courts. It is hardly an arguable proposition that statutory provisions defining PINS in terms of deportment which endangers morals, leading an idle, dissolute, lewd or immoral life, and the like, are demonstrably vague and should be stricken from the statutes.⁸¹ I would suggest, however, that the statutes couched in terms of incorrigibility, ungovernability and beyond parental control are sufficiently clear to withstand constitutional attack if they are so limited as to encompass reasonable and lawful commands and that

78. 84 Wash. 2d 874, 529 P.2d 1096 (1975).

79. *Id.* at 878, 529 P.2d at 1100.

80. See *Commonwealth v. Brasher*, 359 Mass. 550, 270 N.E.2d 389 (1971). In *Brasher* the court observed that

the law clearly does not make mere expressions of disagreement or differences of views or opinions between parents and child a crime on the part of the child. But it does not permit or excuse stubborn refusals by children to obey reasonable and lawful commands of their parents or persons similarly situated on a claim that it is merely the exercise of a right of dissent.

Id. at 554, 270 N.E.2d at 393. Accord *In re Gras*, 337 So. 2d 641 (La. Ct. App. 1976); *District of Columbia v. B.J.R.*, 332 A.2d 58 (D.C.), cert. denied, 421 U.S. 1016 (1975).

One writer, commenting on provisions such as those formerly in effect in California ("[a minor] who persistently or habitually refuses to obey the reasonable and proper orders or directions of his parents . . . or school authorities. . . ." CAL. WELF. & INST. CODE § 601 (West 1972) (amended 1974)) has stated:

[T]he subject does not admit of a more certain formulation. Such a standard is workable. It suggests, without undue ambiguity, the considerations that are relevant to support court action; it gives a fair indication of the conduct to which legal consequences attach. This is not to say that all existing formulations are exempt from criticism for vagueness. The argument merely affirms that a satisfactory standard can be formulated. Moreover, limiting delinquency to violations of criminal law also involves resort to uncertainties. Consider "disorderly conduct", "vagrancy", "disturbing the peace"—each a crime in spite of its lack of precision.

Paulsen, *The Delinquency, Neglect & Dependency Jurisdiction of the Juvenile Court*, in *JUSTICE FOR THE CHILD*, 50 (M. Rosenheim ed. 1962).

81. See notes 54-71 and accompanying text *supra*.

proscriptions of habitual truancy and running away from home do not raise significant vagueness problems. A statutory scheme thus limited would not only be responsive to the charge of vagueness, but would also enable the juvenile court to continue to deal with those areas of children's conduct in which the state has a legitimate interest. In this connection, one wonders whether the conduct charged and proved in a significant number of cases in which attacks have been made on PINS statutes for vagueness and overbreadth would nevertheless clearly fall within the jurisdiction of the juvenile courts under this narrowed statutory definition. In *E.S.G. v. State*,⁸² the finding of delinquency was based upon a section of the Texas Juvenile Act defining a delinquent child as one who "habitually so depraves himself as to injure or endanger the morals or health of himself or others."⁸³ The conduct charged and proved was that the fourteen-year-old appellant had been absent from home for several days at a time, including a period of one week on occasion, and was found in a transient apartment with an adult male. Obviously, if the statute had contained the typical runaway provision, it would have furnished an appropriate basis for jurisdiction and would have avoided running afoul of vagueness problems.⁸⁴ In other reported cases involving claims of vagueness of omnibus clauses in PINS statutes, however, the conduct giving rise to the proceedings is not set forth clearly, if it appears at all.⁸⁵

In proceedings brought under ungovernability, incorrigibility, and beyond parental control provisions, on the other hand, it is quite clear that under a narrowed statute the conduct described in the cases would properly continue to invoke juvenile court jurisdiction. *In re Gras*⁸⁶ typifies cases of this variety. The appellant, who challenged a Louisiana statute which defined a child in need of supervision as one who "habitually disobeys the reasonable and lawful demands of his parents . . . and is ungovernable and beyond their control,"⁸⁷ had run away from home on six occasions and also had violated the conditions of probation. Similarly, in

82. 447 S.W.2d 225 (Tex. Ct. App. 1969); *cert. denied*, 398 U.S. 956 (1970).

83. TEX. REV. CIV. STAT. ANN., art. 2338-1 § 3(f) (Vernon 1971) (repealed 1973).

84. Subsequent to the decision in *E.S.G. v. State*, the Texas statute was substantially amended. The questionable language relating to endangerment of morals was removed, and the definition of "conduct indicating a need for supervision" now includes "[t]he unexcused voluntary absence of a child on 10 or more days or parts of days within a six-month period or three or more days or parts of days within a four week period from school." See TEX. FAM. CODE ANN. tit. 3, § 51.03 (Vernon Supp. 1978).

85. See, e.g., *S**** S**** v. State*, 299 A.2d 560, 561 (Me. 1973) ("We are not informed by the record exactly what conduct of the juvenile was alleged in the petitions as supporting the conclusory allegations."); *Gonzalez v. Mailliard*, No. 50424 (N.D. Cal. 1971), *vacated and remanded*, 416 U.S. 918 (1974). (It appears that in the case of at least three of the ten plaintiffs the underlying conduct was an assault of a girl which, presumably, would be encompassed within other provisions of the juvenile delinquency statute.); *State v. L.N.*, 109 N.J. Super. 278, 263 A.2d 150 (1970) (Defendant was allegedly found sniffing carbon tetrachloride. There is a suggestion in the opinion that he may have violated a section of the state's glue sniffing statute, but he was charged only under the omnibus clause.).

86. 337 So. 2d 641 (La. Ct. App. 1976).

87. LA. REV. STAT. ANN. § 13.1569(15)(b) (West Supp. 1978).

District of Columbia v. B.J.R.,⁸⁸ appellee was charged with absconding from home on five occasions, the last three of which were within the nine-month period before the petition was filed alleging her to be a child in need of supervision. Simply stated, a review of the reported cases suggests that carefully drafted ungovernability statutes, applied to the conduct described in the cases, ought not to raise significant constitutional vagueness problems.⁸⁹

B. *Punishment of Status*

Whether the law may respond, or ought to respond, to certain kinds of noncriminal misconduct by children in a way which differs from its response to conduct by adults is the question at the heart of a number of proposals to abolish PINS jurisdiction. All too frequently, nevertheless, the question is addressed in terms of the proposition that "status offenses" should be removed from the jurisdiction of the juvenile courts.⁹⁰ The term status offense has been variously defined, when defined at all, by those who insist upon using it.⁹¹ This is at best confusing, and at worst an inaccurate and misleading usage.

88. 332 A.2d 58 (D.C. 1975), *cert. denied*, 421 U.S. 1016 (1975).

89. See, e.g., *Blondheim v. State*, 84 Wash. 2d 874, 529 P.2d 1096 (1975) (petitioner admitted running away from home on at least six occasions); *In re Napier*, 532 P.2d 423 (Okla. 1975) (conduct included running away from home and refusing to attend school); *In re Jackson*, 6 Wash. App. 962, 497 P.2d 259 (Ct. App. 1972) (conduct included failure to attend school and use of dangerous drugs).

In the final analysis, the void-for-vagueness argument, when applied to PINS statutes, becomes in one sense a *reductio ad absurdum*. It should be kept in mind that in the exercise of PINS jurisdiction the courts are more often than not dealing with the conduct of subteens, including eight-, nine- and ten-year olds. Nevertheless, the courts continue to pay lip service to the notion that a critical question is whether the statutes give fair notice or are framed in language which a respondent child has the ability to comprehend. See, e.g., *Blondheim v. State*, 84 Wash. 2d 874, 529 P.2d 1096 (1975); *In re Burris*, 275 N.C. 517, 169 S.E.2d 879 (1969); *In re Jackson*, 6 Wash. App. 962, 497 P.2d 259 (1972). I do not mean to suggest that the notice aspect of the vagueness doctrine does not make sense in other contexts. One may reasonably assume, for example, that corporate officers and other business persons, or their lawyers, carefully consult the statutes and regulations which govern their activities before undertaking to engage in such activities. By the same token, it is not unlikely that persons engaging in conduct ostensibly protected by the first amendment, such as picketing, publishing, leafleting and various kinds of protest demonstrations have, at least in some instances, familiarized themselves with applicable statutes or ordinances before acting. It is far more questionable, however, despite language in the cases, that children consult the statute books before engaging in the kinds of noncriminal misbehavior defined in PINS enactments. Thus, it can hardly be suggested seriously that legislatures should be put to the test of writing nonvague statutes for eight-year olds. It is the second aspect of vagueness, however, which is critically important if, as I believe is likely and desirable, the juvenile courts continue to exercise jurisdiction in PINS proceedings. More narrowly drafted statutes would serve to avoid the danger of the improper delegation of policy matters to judges, which assertedly leads to the exercise of discretion in a manner which is arbitrary and discriminatory. See Rosenterg & Rosenberg, *supra* note 41, at 1124.

90. See, e.g., Gilman, *supra* note 24; Martin, *Status Offenders and the Juvenile Justice System. Where Do They Belong*, 28 Juv. JUST. 7 (1977); Martin & Snyder, *Jurisdiction Over Status Offenses Should Not Be Removed From the Juvenile Court*, 22 CRIME & DELINQUENCY 44 (1976).

91. "[T]he most general definition of a status offender is a child who commits an offense that would not be considered a crime if it were committed by an adult. A variety of more explicit definitions are available, yet the vast majority deal with this central theme." Martin, *supra* note 90, at

In a recent commentary, the observation appears that "the Supreme Court of the U.S. has ruled that it is constitutionally impermissible to impose sanctions on a status in the case of an adult, *Robinson v. California*, 370 U.S. 660 (1962). Yet . . . that is what the juvenile court's status offense jurisdiction does with respect to unruly children."⁹² This statement, if it is not totally misleading, reflects an altogether too careless reading of *Robinson v. California*.⁹³ The Court in *Robinson* struck down a section of the California Health and Safety Code that made it a criminal offense to "be addicted to the use of narcotics." The statute, therefore, made "the 'status' of narcotic addiction a criminal offense for which the offender may be prosecuted 'at any time before he reforms'."⁹⁴ This was held to inflict cruel and unusual punishment in violation of the eighth and fourteenth amendments because it imprisoned "a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the state or been guilty of any irregular behavior there."⁹⁵ The scope and limitations of the decision may be readily ascertained from the Court's precise language, for it is clear that it was the mere status of being a narcotic addict which could not be made criminal, as distinguished from the "irregular behavior" which might accompany such a status.⁹⁶

If there could have been any doubt about the clear teaching of *Robinson*, it was surely laid to rest in *Powell v. Texas*.⁹⁷ The appellant in *Powell* challenged his conviction under a provision of the Texas Penal Code which proscribed getting drunk or being found intoxicated in a public place. The Supreme Court upheld Powell's conviction, and in a plurality opinion Mr. Justice Marshall pointed out that "appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion."⁹⁸ The plurality opinion further noted that

[t]he entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some

9. "A status offense is a noncriminal act that subjects the child to the jurisdiction of the juvenile court not because of the act itself—it would not be a crime if it were committed by an adult—but because of his status: he is a juvenile." Gilman, *supra* note 24, at 49.

92. IJA-ABA STANDARDS, NONCRIMINAL MISBEHAVIOR, *supra* note 24, at 11.

93. 370 U.S. 660 (1962).

94. *Id.* at 666.

95. *Id.* at 667.

96. Indeed, just a few years later, the California Supreme Court in *People v. O'Neil*, 62 Cal. 2d 748, 401 P.2d 928, 44 Cal. Rptr. 320 (1965), so distinguished the *Robinson* principle, finding no constitutional infirmity in a section of the state's Vehicle Code which made it a felony for a narcotic addict, or one under the influence of narcotics, to drive a vehicle on any highway. 62 Cal. 2d at 754 n.9, 401 P.2d at 931 n.9, 44 Cal. Rptr. at 323 n.9. See also *United States v. Bishop*, 469 F.2d 1337 (1st Cir. 1972); *Bruno v. Louisiana*, 316 F. Supp. 1120 (E.D. La. 1970).

97. 392 U.S. 514 (1968).

98. *Id.* at 532.

behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*.⁹⁹

PINS statutes which prohibit habitual truancy, running away from home, and the like proscribe particular kinds of conduct or behavior, and obviously do not fall within the *Robinson-Powell* rationale. Indeed, even when the statutes are cast in somewhat broader terms, such as incorrigible, ungovernable, or beyond parental control, an examination of those statutes and the court decisions interpreting them will show that the conduct or behavior of a child on a particular occasion or occasions is involved.¹⁰⁰ Accordingly, the courts have properly rejected the argument that PINS statutes so phrased permit punishment of a status in violation of the eighth amendment proscription against the infliction of cruel and unusual punishment. In sum, Judge Polier has appropriately stated that "when youths are brought before the court on petitions alleging continuing misconduct and the statutes require specific charges and dates, the use of the term status offender is not appropriate. It mistakes the real issue and the real problems arising from conduct *not* status."¹⁰¹

As I have suggested at the beginning of this part of the discussion,¹⁰² the "real issue" that underlies the various recommendations that juvenile court jurisdiction over children's noncriminal misbehavior be abolished is encompassed within the proposition that the legal position of children should be precisely the same as that of adults. It is astonishing to note that this radical proposal has been clearly and unequivocally articulated by lay advocates of "children's liberation." One writer, for example, explicitly rejects any double standard, calling for "the right to a single standard of morals *and behavior* for children and adults."¹⁰³ Similarly, another commentator suggests that any young person should have "[t]he right to do, in general, what any adult may legally do."¹⁰⁴ Such espousals as these, obviously, are hardly in keeping with traditional notions with respect to the legal position of children. They are, in fact, almost entirely contrary to the current state of the law. No one would deny that the legal situation of

99. *Id.* at 533.

100. See cases cited at notes 82-84 & 86-89 and accompanying text *infra*.

101. Polier, *The Future of the Juvenile Court*, 26 JUV. JUST. 3, 6 (1975).

102. See text accompanying notes 90-91 *supra*.

103. R. FARSON, *supra* note 2, at 27 (emphasis added). Farson further observes: Children, like adults, should have the right to decide the matters which affect them most directly. The issue of self-determination is at the heart of children's liberation. It is, in fact, the only issue, a definition of the entire concept. The acceptance of the child's right to self-determination is fundamental to all the rights to which children are entitled Children would have the right to engage in acts which are now acceptable for adults but not for children, and they would not be required to gain permission to do something if such permission is automatically granted to adults.

Id. at 27.

104. J. HOLT, *supra* note 2, at 19. Holt proposes: [T]he rights, privileges, duties, responsibilities of adult citizens [should] be made available to any young person, of whatever age, who wants to make use of them. These would include, among others:

children has in recent years changed substantially as the law has come to recognize their rights in a number of areas.¹⁰⁵ There remains, nevertheless, the strong presumption of minors' incapacity which continues to be reflected in various restrictions on children's freedom to exercise any number of rights accorded to adults.¹⁰⁶ A far from exhaustive catalogue would include proscriptions against or restrictions upon voting, getting married, entering into binding contracts, driving automobiles,¹⁰⁷ drinking alcoholic beverages, and remaining on the streets at any and all hours of the night. The same well-entrenched presumption with respect to the immaturity and capacity of minors is reflected in the determination by the United States Supreme Court that with respect to the distribution of allegedly obscene materials to minors, a state might constitutionally apply a more restrictive definition of obscene materials than it does in the case of adults.¹⁰⁸

1. The right to equal treatment at the hands of the law—i.e., the right, in any situation, to be treated no worse than an adult would be.

2. The right to vote, and take full part in political affairs.

3. The right to be legally responsible for one's life and acts.

4. The right to work, for money.

5. The right to privacy.

6. The right to financial independence and responsibility—i.e., the right to own, buy and sell property, to borrow money, establish credit, sign contracts, etc.

7. The right to direct and manage one's own education.

8. The right to travel, to live away from home, to choose or make one's own home.

9. The right to receive from the state whatever minimum income it may guarantee to adult citizens.

10. The right to make and enter into, on a basis of mutual consent, quasi-familial relationships outside one's immediate family—i.e., the right to seek and choose guardians other than one's own parents and to be legally dependent on them.

Id. at 18-19.

105. See cases cited in notes 3-10 *supra*.

106. See Comment, *Status Offenders and the Status of Children's Rights: Do Children Have The Legal Right To Be Incurable*, 1974 B.Y.U.L. Rev. 659, 684; Hafen, *supra* note 1. Hafen states:

The presumption of minors' incapacity has been so strong that the growth of democratic ideals in American society, rather than encouraging the 'liberation' of children from limitations upon their liberty, has encouraged even greater discrimination on the basis of age—to protect children from the excesses of their immature faculties and to promote the development of their ability ultimately to assume responsibility. The juvenile court movement and the expansion of compulsory public education are obvious examples of the way American democratization has reflected the views of Locke and Mill about protecting and developing the capacities of the young.

Id. at 613.

The immaturity, and hence, the presumed incapacity, of children has been largely ignored in the legal literature that is most harshly critical of PINS jurisdiction. See articles cited at note 24 *supra*. It has not, however, been altogether ignored. Wald, for example, while urging the extension to children over 12 of a whole range of civil rights, including freedom of speech and association, concedes that some of them "may have to be redefined, in some instances even curtailed, as applied to youths." Wald, *supra* note 1, at 21.

Remarkably enough, Holt, one of the more vehement apostles of "children's liberation" describes children as

animals and sensualists; to them, what *feels* good is good. They are self-absorbed and selfish. They have very little ability to put themselves in another person's shoes, to imagine how he feels. This often makes them inconsiderate and sometimes cruel, but whether they are kind or cruel, generous or greedy, they are always so on impulse, rather than by plan or principle.

Holt, *supra* note 2, at 114 (emphasis in original).

107. See *Berberian v. Petit*, 374 A.2d 791 (R.I. 1977).

minors, a state might constitutionally apply a more restrictive definition of obscene materials than it does in the case of adults.¹⁰⁸

A trilogy of recent Supreme Court pronouncements recognizing the rights of minors vis-a-vis the state with respect to services and information in the sex-related areas of abortion and contraception, although they significantly expand the rights of minors, are not a rejection of or in any way inconsistent with notions of the immaturity and presumed incapacity of children. In *Planned Parenthood of Central Missouri v. Danforth*¹⁰⁹ the Court held unconstitutional a Missouri statute which, in effect, afforded to the parent of a child a veto over a decision by a physician and his minor patient to terminate a pregnancy. In the course of its opinion, however, the Court reaffirmed its long standing recognition of the principle that the state's authority to regulate children's conduct was broader than its authority to regulate the conduct of adults.¹¹⁰ In addition, the Court included a significant *caveat* in its decision, emphasizing that it did not mean to suggest in its holding "that every minor, regardless of age or maturity, may give effective consent for the termination of her pregnancy."¹¹¹

In a subsequent case, *Bellotti v. Baird*,¹¹² the Court noted that its decision in *Danforth* had not only struck down a statute creating a parental veto, but also had held that a written consent requirement for a pregnant adult would be unconstitutional only if it unduly burdened the right to an abortion. In *Bellotti*, the Court explicitly recognized that there were greater risks with respect to the ability of a pregnant minor to give informed consent for an abortion.¹¹³ Accordingly, while remanding the case to the Supreme Judicial Court of Massachusetts for further proceedings, the Court indicated that it might find no constitutional infirmity in

a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests.¹¹⁴

In short, the Court's opinion in *Bellotti* suggests that even in the area of abortion, where the Court has afforded the most extensive constitutional

108. *Ginsberg v. New York*, 390 U.S. 629 (1968); *See also Erznoznik v. Jacksonville*, 422 U.S. 205, 212-213 (1975).

109. 428 U.S. 52 (1976).

110. *Id.* at 74.

111. *Id.* at 75.

112. 428 U.S. 132 (1976).

113. *Id.* at 147.

114. *Id.* at 145.

protection to adults,¹¹⁵ differentiation in treatment between adults and minors is permissible.

Although the final case in the trilogy, *Carey v. Population Services International*,¹¹⁶ might appear to be the most far reaching in its extension of the rights of children to have access to sex-related health services, it is not inconsistent with the Court's earlier opinions which recognize the immaturity and incapacity of children. In *Carey* the plaintiffs successfully challenged a provision of the New York Education Law which made it a misdemeanor to sell contraceptive articles or drugs to minors under sixteen years of age.¹¹⁷ The Court rejected the state's argument that the statute served significant state interests in that it advanced New York's policy of discouraging sexual activity among children,¹¹⁸ but the Justices noted with care that they were not departing from earlier holdings relating to the scope of the state's power to control children's behavior,¹¹⁹ even in the context of the right to sexual privacy.¹²⁰

Thus, it would seem to be beyond question that the law is not required to treat adults and children according to a single standard of conduct.¹²¹ As Judge Dembitz pertinently observed:

115. See *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

116. 431 U.S. 678 (1977).

117. The challenged provision of the New York Education Law provided in pertinent part: "It shall be a class A misdemeanor for . . . 8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of contraception to a minor under the age of sixteen years." N.Y. EDUC. LAW § 6811 (McKinney 1972).

118. *Carey v. Population Serv. Int'l* 431 U.S. 678, 689 (1977).

119.

"[We] have held in a variety of contexts that 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults', *Prince v. Massachusetts*, supra, 321 U.S. at 170 . . . *Ginsberg v. New York*, 390 U.S. 629 (1968). . . . See also, *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971)."

Id. at 688.

120. The plaintiffs in *Carey* asserted that New York's policy of discouraging children's sexual activity was itself unconstitutional, arguing "that the right to privacy comprehends a right of minors as well as adults to engage in private consensual sexual behavior." *Id.* at 689, n.17.

Mr. Justice Brennan, writing for the Court responded:

We observe that the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating such behavior among adults. See generally Note, On Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U.L. REV. 670, 719-738 (1973). But whatever the answer to that question, *Ginsberg v. New York*, 390 U.S. 629 (1968) . . . indicates that in the area of sexual mores, as in other areas, the scope of permissible state regulation is broader as to minors than as to adults. In any event, it is unnecessary to pass upon this contention of appellees, and our decision proceeds on the assumption that the Constitution does not bar state regulation of the sexual behavior of minors.

Id.

121. Some members of the Court were far less willing to leave the question open and proceed on Mr. Justice Brennan's assumption. Mr. Justice Powell, although agreeing that the New York statute was constitutionally defective, nevertheless recognized "the State's concern that its juvenile citizens generally lack the maturity and understanding necessary to make decisions concerning marriage and sexual relationships." *Id.* at 695. Similarly, Mr. Justice Stevens, with Mr. Justice White in agreement, described as "frivolous" appellees' argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objections of both parents and the State." *Id.* at 701.

In the uncontrollable or beyond-lawful-authority child cases, the same basic question is posed: How should the courts treat the plasticity of children and their incapacity for self-direction as compared to adults? Differentiations between them rest on physiological and psychological fact, rather than cultural bias, as in the case of race or sex.¹²²

C. *Stigma*

A third criticism of PINS jurisdiction is the proposition that adjudication as a PINS has a "stigmatizing" effect upon the respondent child.¹²³ Typical of this view are the introductory comments by the Reporter of the Standards Relating to Noncriminal Misbehavior of the IJA-ABA Juvenile Justice Standards Project. The Reporter asserts that " 'status offenders' . . . likely bear the same burdens of stigma as do delinquents."¹²⁴ At another point, he labels as "perverse reasoning" the belief held by courts and court personnel that a PINS adjudication results in less stigma than a delinquency adjudication.¹²⁵ Similarly, a recent critique of predelinquency diversion projects notes, apparently uncritically and without question, that the projects "function on what is by now the banal assumption that the formal processes of the juvenile justice system—courts, probation, detention—tend to be stigmatizing and ineffective in preventing further delinquent acts. . . ."¹²⁶ This statement raises by implication, but leaves unanswered, the question of what evidence, if any, supports this "banal assumption" and entitles it to continued indulgence. One may fairly ask whether, in light of the evidence, it is rational to conclude, or indeed even to argue, that "stigmatization" is a persuasive rationale in support of proposals for the abolition of PINS jurisdiction.

Underlying the assertion that stigma is a significant negative factor in the juvenile justice process is the "labeling hypothesis," which posits that "a young person who has not committed a criminal act but is treated as and stigmatized as a delinquent is likely to become one"¹²⁷ A recent,

This proposition was recently reaffirmed in another context in the first federal case adjudicating the constitutionality of a juvenile curfew ordinance. See *Bykofsky v. Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd mem.*, 535 F.2d 1245 (3rd Cir.), *cert. denied*, 429 U.S. 964 (1976).

122. Dembitz, *Justice for Children—Now and for the Future*, 60 A.B.A.J. 588, 589 (1974) (footnotes omitted).

123. See Gough, *Beyond Control in the Juvenile Court—The Climate For Change*, in *BEYOND CONTROL* 272 (L. Teitelbaum & A. Gough eds. 1977); Orlando & Black, *Classification in Juvenile Court: The Delinquent Child and the Child in Need of Supervision*, 25 JUV. JUST. 13, 19 (1974); Rosenberg & Rosenberg, *supra* note 41, at 1128; Stiller & Elder, *supra* note 24, at 40.

124. IJA-ABA STANDARDS, NONCRIMINAL MISBEHAVIOR, *supra* note 24, at 3.

125. *Id.* at 8.

126. Schrag & Divoky, *The New Juvenile Justice at Work*, 2 CIV. LIB. REV. 57, 58 (1975).

127. IJA-ABA STANDARDS, NONCRIMINAL MISBEHAVIOR, *supra* note 24, at 6. Orlando & Black, *supra* note 123, at 20, describe labeling theory as the suggestion that official response to delinquent behavior may often act to push the juvenile further into deviant conduct. This theory has generally been called the 'labeling hypothesis'. The thrust of the concept is that being identified as a juvenile results in a 'spoiled' public identity. The label results in degree of public liability through exclusion from participation in groups and

thoroughgoing study by Anne Rankin Mahoney,¹²⁸ however, examines the literature describing empirical research on labeling theory as it relates to juveniles, casts considerable doubt on the validity of the labeling hypothesis, and suggests that an affirmative response to the question posed above cannot be given with any confidence. Mahoney notes that there is a paucity of literature on the subject dealing specifically with juveniles,¹²⁹ and after examining recent studies purporting to show that later delinquent behavior increases as a result of labeling, finds that the evidence on labeling theory is in conflict.¹³⁰ Mahoney also examines empirical studies treating reactions to labeled youths by family and community and the impact of labeling upon the juvenile's self-concept.¹³¹ In view of the conventional wisdom with respect to labeling (or the vice of stigmatization),¹³² Mahoney's conclusions are arresting:

Perhaps, as research on labeling accumulates and becomes more precise, and as we become better able to raise researchable questions, labeling will emerge as an important causal factor in the etiology of delinquent behavior. Meanwhile, no such evidence exists, and it would be a disservice to both the labeling perspective and the youths in the juvenile justice system to act as if it did.¹³³

Since Mahoney's significant critique of labeling theory was based upon work undertaken for the Institute of Judicial Administration and American Bar Association Juvenile Justice Standards Project, it is distressing that the Reporter for the Project's volume, *Noncriminal*

events which would not occur without the prior attachment of the label. The social liability has the further effect of reinforcing the deviance.

Id. at 20.

128. Mahoney, *The Effect of Labeling Upon Youths in the Juvenile Justice System: A Review of the Evidence*, 8 LAW & SOC'Y REV. 583 (1974).

129. *Id.* at 586, 590. With respect to the studies she describes, Mahoney also points out: [A]ll suffer from methodological problems because this is a very hard area in which to conduct precise research. Labeling theory, as it is formulated, gives little guidance to the researcher who wants to test its propositions. Although data on labeled offenders is abundant and relatively easy to find, control data on comparable unlabeled offenders is expensive and difficult to obtain. It is very hard to find similar youths who have committed similar offenses—some of whom have been labeled and some of whom have not. Furthermore, it is hard to find comparable youths who have had different dispositions and thus different degrees of labeling.

Id. at 590-91 (citation omitted).

130. *Id.* at 597.

131. *Id.* at 599-608.

132. See notes 123-26 and accompanying text *supra*.

133. Mahoney, *supra* note 128, at 611. Mahoney's conclusion is apparently shared by others: The labeling view has been criticized for lack of precision within its theories and there does not exist a strong empirical literature which has tested the major assertions of this school. Much of the research in support for the labeling views needs to be conducted before a final judgment can be made about the utility of the theory. Moreover, many believe that the labeling perspective should be integrated with other theories of juvenile delinquency—particularly the psychodynamic theories on delinquency—to improve the explanatory power of labeling theory.

Misbehavior, declines to make reference to its persuasive analysis and conclusions; instead, he merely acknowledges it when conceding that labeling theory "has been under recent attack."¹³⁴ Moreover, the sole study cited by the Reporter as "recent evidence to the contrary" of findings such as Mahoney's,¹³⁵ a study by Robert G. Culbertson of 222 boys incarcerated at the Indiana Boys Training School, a custodial institution,¹³⁶ contains the explicit *caveat* that "[i]t is not contended that the research presented here is a test of labelling theory."¹³⁷ Since Culbertson concludes only that his study furnishes "some tentative support for the labelling perspective,"¹³⁸ the Reporter's conclusion that the study "demonstrated that the minors became what they were labeled to be"¹³⁹ is at least highly questionable if not entirely misleading.

Even if one concedes for the purpose of argument that the conclusion is justifiable, it provides no support whatsoever for the proposal that PINS jurisdiction be abolished. As its title suggests, Culbertson's study was limited to delinquent inmates of a custodial institution. One may readily concede that institutionalization of PINS children is in many cases undesirable, and there is good reason to believe that it may become a thing of the past in the foreseeable future.¹⁴⁰ Nevertheless, it is the merest armchair speculation to assert that any form of coercive intervention with respect to children who are currently subject to the PINS jurisdiction of the juvenile courts will inevitably result in such labeling and stigmatization as will significantly affect the child's self-concept and lead to future antisocial behavior.¹⁴¹

D. *Arguments Against PINS: An Overview*

The discussion above has suggested that none of the three arguments against PINS present a valid basis to justify abolishing the jurisdiction. Vagueness attacks are appropriate with respect to only one of three general categories of PINS provisions, and this category can be amended or abolished without impairing the basic statutory scheme that governs noncriminal misbehavior of children. Second, arguments that PINS provisions unconstitutionally punish status are misdirected, while

134. IJA-ABA STANDARDS, NONCRIMINAL MISBEHAVIOR, *supra* note 24, at 6.

135. *Id.* at 6.

136. Culbertson, *The Effect of Institutionalization on the Delinquent Inmate's Self Concept*, 66 J. CRIM. L. & CRIMINOLOGY 88 (1975).

137. *Id.* at 93.

138. *Id.*

139. IJA-ABA STANDARDS, NONCRIMINAL MISBEHAVIOR, *supra* note 24, at 6-7.

140. See notes 187-89 and accompanying text *infra*.

141. This is precisely the kind of speculation suggested by the conclusions set out in the ABA-IJA Project volume on the subject: "On common sense grounds, given the lack of conclusive empiric data, it seems likely that (1) coercive judicial intervention in unruly child cases produces some degree of labeling and stigmatization; and (2) whatever effect this has on the child's self-perception and future behavior will be adverse." IJA-ABA STANDARDS, NONCRIMINAL MISBEHAVIOR, *supra* note 24, at 7.

suggestions that children should be treated the same as adults in all respects have little support in Anglo-American jurisprudence. Finally, notions that PINS adjudication has a stigmatizing effect on children simply have not been proved, and the most authoritative study of the social science theory of "labeling" has recognized that research methods are at present too imprecise to draw conclusions. In Part IV, therefore, reasons for retention of PINS jurisdiction will be explored with the hope that future efforts will be directed toward making the PINS statutory scheme a better system for dealing with juveniles who are in need of assistance.

IV. REASONS FOR THE RETENTION OF PINS JURISDICTION

A. *Family Autonomy*

There is a strong and enduring tradition of family autonomy in American law, of which the natural concomitant is parental authority.¹⁴² Beginning with *Meyer v. Nebraska*,¹⁴³ in which the United States Supreme Court explicitly recognized the right "to marry, establish a home and bring up children"¹⁴⁴ as a "liberty" guaranteed by the fourteenth amendment, the Court has over the years given strong support to the prerogative of parents vis-a-vis the state. Shortly after its decision in *Meyer*, the Court unequivocally reaffirmed this principle in *Pierce v. Society of Sisters*,¹⁴⁵ a proceeding initiated by two private educational institutions to enjoin the enforcement of Oregon's Compulsory Education Law, which required parents to send their children to public schools. The Court observed:

Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹⁴⁶

142. See generally FOOTE, LEVY & SANDER, CASES AND MATERIALS ON FAMILY LAW I-26 (2d ed. 1976); Hafen, *supra* note 1, at 615-26. One writer has observed:

When you talk about the family, you're talking about a sacred institution in American civilization. We rely on the family to provide the basic controls of our culture. We expect parents to run the show; we expect parents to be in charge of their children, and we back the parents up with legal authority and judicial sanctions.

Arthur, *Status Offenders Need Help, Too*, 26 Juv. JUST. 3, 5 (1975).

143. 262 U.S. 390 (1923).

144. *Id.* at 399.

145. 268 U.S. 510 (1925).

146. *Id.* at 534-35.

Almost a half-century later in *Wisconsin v. Yoder*¹⁴⁷ the Court reaffirmed the principles of family autonomy and parental authority announced in *Meyer* and *Pierce*. In *Yoder* the parents who were members of the Old Order Amish Religion challenged their convictions for violating the compulsory education law of the State of Wisconsin, which required all parents to cause their children to attend public or private school until age sixteen. The respondents refused to send their fourteen- and fifteen-year-old children to public school after they had completed the eighth grade and claimed that the requirements of the Wisconsin statute violated their rights under the fourteenth amendment and the free exercise clause of the first amendment. The Supreme Court affirmed the judgment of the Supreme Court of Wisconsin, which had invalidated respondents' convictions, and quoted with approval its language from *Pierce* set out above, which was characterized as "perhaps the most significant statement of the Court in this area"¹⁴⁸ The Court further observed:

[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.¹⁴⁹

In the intervening years between its pronouncements in *Pierce* and *Yoder*, both of which implicated compulsory education laws, the Court has reaffirmed the principle of family autonomy in a variety of contexts.¹⁵⁰ The cases illustrate that when the rights of parents to control their children have come into direct conflict with interests asserted on behalf of the state, the Court has been scrupulously protective of parental authority. As has been observed elsewhere,¹⁵¹ however, the Court has not dealt directly with the case in which the rights of parents to control their children have conflicted with interests asserted on behalf of the child. Most often, it is this latter variety of conflict which is involved when PINS jurisdiction is invoked on the ground of incorrigibility, ungovernability or being

147. 406 U.S. 205 (1972).

148. *Id.* at 232.

149. *Id.*

150. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942), in which the Court, striking down Oklahoma's Habitual Criminal Sterilization Act, observed: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541; *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965). See also *Cleveland Board of Educ. v. LaFleur*, 414 U.S. 632 (1974), in which the Court upheld a challenge to the requirement of mandatory maternity leaves for teachers, stating that "[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 639-40. Further, the Court's recognition of the principle has not been limited to traditional families held together by matrimonial bonds. See *Stanley v. Illinois*, 405 U.S. 645 (1972).

151. See *Hafen*, *supra* note 1, at 619.

beyond parental control.¹⁵² Further, the retention of PINS jurisdiction in such cases is consistent with notions of family autonomy and its essential concomitant, parental authority.

Despite currently popular assertions to the contrary,¹⁵³ this is hardly a startling proposition and indeed it has been expressed persuasively and cogently in another context. In a discussion of voluntary commitments of children to mental institutions by their parents, James W. Ellis has noted: "Thomas Szasz argues that a source of parental power is the law's interest in shoring up the institution of the family, and that hospitalization serves this interest by reducing family tensions 'without disrupting the moral integrity of the family as an institution'."¹⁵⁴ Ellis further observes:

One does not have to share Szasz's ideology to agree that commitment laws, and juvenile commitment provisions in particular, have as their paramount objective the maintenance of family autonomy in dealing with aberrational behavior within the family. As a result, the authority granted to parents in the area of commitment to mental hospitals is extremely broad.¹⁵⁵

Apart from arguments on the merits concerning parental commitment of children to mental institutions,¹⁵⁶ a subject beyond the scope of this essay, it may be suggested that PINS jurisdiction similarly serves the purpose of protecting family integrity by dealing with children whose behavior imperils it. Both common sense and experience teach that the aberrational conduct of one member of the family may place severe strain on the functioning of the family as a unit.¹⁵⁷ This is a factor which appears not to have been taken into account in proposals for the abolition of PINS jurisdiction.

One reformer has proposed that the courts should recognize parental freedom only to the degree that such recognition is compatible with the recognition of children's rights as individuals, apparently arguing, in

152. In one study of PINS jurisdiction sponsored by the IJA-ABA Juvenile Justice Standards Project, the authors report that 59% of PINS petitions are brought by parents or parental surrogates. Note, *supra* note 24, at 1385. Similarly, in a survey of PINS adjudicated children conducted by the Office of Children's Services of the Judicial Conference of the State of New York, it was found that 65% of the petitions were filed by the mothers of respondent children. JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, THE PINS CHILD—A PLETHORA OF PROBLEMS 44, 64 (1973) [hereinafter cited as THE PINS CHILD: A PLETHORA OF PROBLEMS].

153. A not atypical view has it that allowing formalized coercive intervention (which is coercive only on one side—the child's), in unruly child cases undermines family autonomy, isolates the child, polarizes parents and children, encourages parents to abdicate their functions and roles to the court, may blunt the effectiveness of any ameliorative services that are provided, and cuts against the development of controls and means within the family for the resolution of conflicts.

IJA-ABA STANDARDS, NONCRIMINAL MISBEHAVIOR, *supra* note 24, at 11-12.

154. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840, 852 (citing T. SZASZ, LAW LIBERTY AND PSYCHIATRY, 154 (1963)).

155. *Id.* at 852.

156. See cases cited at note 10 *supra*.

157. See generally J. Haley, PROBLEM-SOLVING THERAPY (1976); V. SATIR, CONJOINT FAMILY THERAPY 1-2 (1964).

effect, that the rights of children should receive a preferred position.¹⁵⁸ A rational basis for this proposition is not readily apparent,¹⁵⁹ even when it is merely the interests of the parent and a particular child that come into conflict. It is even more difficult to perceive any rationale whatsoever for preferring the misbehaving child when his conduct adversely affects the entire family, particularly other children in the family. In sum, before there is uncritical acceptance of the view that the child's interests should bar coercive state intervention at the behest of the parents, one is entitled to know what child's interests are to be preferred, how and by whom those interests are to be identified, and what resolution is to be made when those interests conflict with the interests of other members of the family.

Expression of this preference by means of abolishing PINS jurisdiction could have particularly severe effects with respect to poor and minority group families. In a frequently cited survey by the Judicial Conference of the State of New York, which dealt with PINS children who were before the New York City Family Court, it was found that forty-eight percent of the children were Black, that twenty-five percent were Puerto Rican and twenty-four percent were Caucasian.¹⁶⁰ Further, the vast majority, or eighty percent, "lived in health districts shown by eleven social, economic and health indices to be the most deprived areas of the city," and sixty-three percent lived below the poverty line.¹⁶¹ Similarly, the authors of a study of "ungovernability" cases brought in two counties under the New York PINS statute claim that forty percent of the sample cases surveyed Black children, twenty-eight percent involved Hispanic children, and thirty-seven percent involved Caucasians.¹⁶² Citing figures such as these, the Reporter of the Standards Relating to Noncriminal Misbehavior of the IJA-ABA Juvenile Justice Standards Project concludes that PINS jurisdiction probably furthers racial and economic discrimination.¹⁶³

It would, of course, be extremely naive to believe that racial and hence economic discrimination do not accompany the exercise of PINS jurisdiction, just as it would be naive to deny its existence in the case of juvenile delinquency jurisdiction or the functioning of the adult criminal

158. Weiss, *supra* note 24, at 610. Cf. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 7 (1973) (expressing in the context of child placement decisions, the "value preference" that "the law must make the child's needs paramount").

159. In the context of child placement, J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 158, at 7, assert that their preference for the law's making the needs of the child paramount "is in society's best interests. Each time the cycle of grossly inadequate parent-child relationships is broken, society stands to gain a person capable of becoming an adequate parent for children of the future."

160. THE PINS CHILD: A PLETHORA OF PROBLEMS, *supra* note 152, at 75.

161. *Id.* at 76.

162. Note, *supra* note 24, at 1387 n.27.

163. IJA-ABA STANDARDS, NONCRIMINAL MISBEHAVIOR, *supra* note 24, at 12-13. The Reporter appropriately concedes that "[b]ecause very little national information is available and one must extrapolate from the few studies that have been done, it is difficult to estimate the degree to which this occurs; the literature is very thin on the ground." *Id.* at 12.

justice system. Nevertheless, the data cited by the Reporter are susceptible to at least one other interpretation. In addition to the statistics setting out the racial composition of the PINS population, the Judicial Conference study revealed that of the 316 petitions included in the survey, sixty-five percent were filed by the mothers of the respondent children.¹⁶⁴ Again, in the ungovernability study referred to above, it was found that fifty-nine percent of PINS petitions were brought by parents or surrogate parents.¹⁶⁵ Thus, it is fair to conclude that abolition of PINS jurisdiction would have the most severe ramifications upon poor and minority group parents who lack alternatives for dealing with the child whose conduct threatens the family and who use the juvenile court as a last resort.¹⁶⁶

B. *Absence of Realistic Alternatives to PINS*

Perhaps the most troubling aspect of proposals for abolition of PINS jurisdiction is the failure of the proponents to devise, or even to suggest, realistic alternatives for resolving the problems that the courts in exercising the jurisdiction have sought to address. To the extent that an alternative is offered at all, it is to insist that the "community,"¹⁶⁷ or more specifically the schools¹⁶⁸ and private social agencies,¹⁶⁹ meet their

164. THE PINS CHILD: A PLETHORA OF PROBLEMS, *supra* note 152, at 44.

165. Note, *supra* note 24, at 1385 n.21.

166. See Rangel, *Juvenile Justice: A Need to Reexamine Goals and Methods*, 5 CAPITOL U.L. REV. 149, 167-68 (1976):

Families who find that they cannot control the behavior of their children, whether because of truancy, late hours, promiscuity or 'incurability', and who do not have access to resources in the community, such as sympathetic school personnel, psychiatric services, or community centers, look increasingly to the filing of a PINS petition as a disciplinary action. Thus, the court has come to be the tribunal of first resort for parents who are unable to cope with the difficult behavior of their children.

167. Comment, *supra* note 24, at 563.

168. Bazelon, *supra* note 24, at 44. Judge Bazelon argues that children skip school because they do not like it, they become uncomfortable, and they are bored and often humiliated. Questioning the practice of reporting children as truants, placing them on probation and ultimately referring them to court and committing them to institutions, Judge Bazelon suggests the "saner and cheaper" alternatives of compulsory school escorts, special community live-in schools and special classes and enriched programs for truants. He concludes:

The situation is truly ironic. The argument for retaining beyond control and truancy jurisdiction is that juvenile courts have to act in such cases because 'if we don't act no one else will'. I submit that precisely the opposite is the case: *because* you act, no one else does. Schools and public agencies refer their problem cases to you because you have jurisdiction, because you exercise it, and because you hold out promises that you can provide solutions.

Id.

Interestingly, Judge Bazelon's words echo strikingly similar observations made a little over a half century ago. In a recent treatment of the origins of the juvenile court movement, the author describes the views expressed in ELIOT, THE JUVENILE COURT AND THE COMMUNITY (1916):

Thomas Eliot . . . wrote a remarkable book . . . in which he argued that, in many respects, the juvenile court was an unnecessary institution and that much of its work could be done by other organizations and, in particular, the schools. Most of the functions performed by the court were not essentially judicial in character. The mere fact of taking child problems into court would give them a penal flavour which was unnecessary and unfortunate He also argued that truancy (and truant-and-parental schools) was more closely allied to education than to the juvenile court or penology

Parker, *supra* note 27, at 292-93 (footnotes omitted).

169. See Bazelon, *supra* note 24, at 42; IJA-ABA, STANDARDS, NONCRIMINAL MISBEHAVIOR, *supra* note 24, at 15.

responsibilities to troubled children. This option would seem necessarily to be based on a number of highly questionable assumptions. First, it rests on the assumption that voluntary agencies, in those communities where they exist, either have the resources to take on the task or the necessary resources will in some way be made available to them. It should, however, be apparent that the facts are to the contrary. The New York State Judicial Conference study notes, for example, that after the New York legislature failed to allocate funds to establish new specialized facilities for the newly created PINS provisions, it became clear that adequate services for PINS children who required placement would not be furnished by private, voluntary agencies.¹⁷⁰ Further, community services were least available where they were most needed.¹⁷¹ Thus, experience suggests that the view that elimination of PINS jurisdiction would "stimulate the creation and extension of a wider range of voluntary services than is presently available"¹⁷² or require the community to devise solutions¹⁷³ is at best speculative and at worst quixotic.

A second questionable assumption underlying the proposed reliance on voluntary agencies is that where such agencies exist, they would be willing to offer a full range of services to children who would otherwise be subject to the PINS jurisdiction of the courts. Again, experience provides no reason to be optimistic on this score. Both empirical evidence¹⁷⁴ and the observation of knowledgeable commentators¹⁷⁵ support the conclu-

170. PINS: A PLETHORA OF PROBLEMS, *supra* note 152, at 7.

171. The study notes the greater access that White children have to community services such as counselling, mental health clinics and the like [T]he Black and Puerto Rican children came from areas where there is a dearth of services while the White children came from somewhat better communities in terms of available resources. In addition . . . school authorities appear to be more lenient toward—or adverse to taking action against—White children.

Id. at 23 (footnotes omitted).

The authors of a recent national study have reached similar conclusions and observed: Facilities for providing services to juveniles are not generally available in many communities, and there is some question as to their ability to prevent delinquent tendencies in status offenders. Even the highly recommended youth service bureaus instituted in a few hundred cities throughout the country have found it difficult to muster the resources to provide necessary services to youth. In the absence of clearly-defined programs to help juveniles, status offenders should remain within the jurisdiction of the juvenile court which can order the necessary services for those youth who often have grave emotional and family problems.

NIJJD, WORKING PAPERS, *supra* note 133, at 145.

172. IJA-ABA, STANDARDS, NONCRIMINAL MISBEHAVIOR, *supra* note 24, at 15.

173. Bazelon, *supra* note 24, at 44.

174. Both the voluntary agencies and DFY Title II programs (facilities operated by the New York State Division for Youth, including urban homes, group homes, foster homes and work camps), are highly selective in the children whom they will accept. The children with serious emotional problems, acting-out adolescents, drug users, children with a history of mental illness, children who lack an intact family—these are the children who will be denied admission to those elite programs. They are the children who have been placed in the shelters or the training schools. The PINS CHILD: A PLETHORA OF PROBLEMS, *supra* note 152, at 9.

175. Justice Wise Polier, an experienced and respected former juvenile court judge has cogently observed:

The proponents of reducing the rate of the juvenile courts stress that little can be achieved through intervention by the state which involves coercion. They put their faith in voluntary

sion that the children most needing services would be least likely to receive them. Furthermore, even if the willingness of voluntary agencies to meet the challenge of providing noncoercive services to the PINS population were not in doubt, there would still be questions about their ability to do so. There is no significant evidence that voluntary agencies are any more competent than governmentally supported institutions.¹⁷⁶ Accordingly, the authors of the New York Judicial Conference study have cautioned that "[t]hese children cannot be left dependent on a social services system or on schools and voluntary programs that have failed and continue to fail to meet their needs."¹⁷⁷

Finally, it is fair to ask what reason there is to believe that PINS children will be willing to make use of the services of voluntary agencies. It seems unlikely that children who have refused voluntarily to go to school or to respond to the parents who are charged with responsibility for their tutelage will be any more willing to look to and respond to the guidance of strangers.¹⁷⁸ It is not suggested here that voluntary agencies do not play or should not play a critical role in the functioning of juvenile courts.¹⁷⁹ It is doubtful, however, that the child requiring services, or his parents, will seek out the agency furnishing services in the absence of the coercive power of the court to make alternative dispositions. Rather, in the absence of PINS jurisdiction, there is reason to believe that significant numbers of children will be abandoned to their own devices.¹⁸⁰

agencies and seem to regard all public services as coercive. They do not recognize that exclusion from services may be the most severe form of coercion practiced against the poor. They have not seemed to comprehend that most children and families coming before the courts have previously been in or rejected by voluntary agencies. They ignore the lack of standards of the preferential admissions policies that deny equal protection. They are blind to the danger now resulting from the proliferation of commercial or proprietary child care agencies under the doctrine that purchase of services that are from private agencies is preferable to public services.

Polier, *supra* note 101, at 6-7. See also Rangel, *supra* note 166, at 168.

176. See *THE PINS CHILD: A PLETHORA OF PROBLEMS*, *supra* note 152, at 81.

177. *Id.* at 80.

178.

If parents acknowledge that they cannot get their child to attend school or cannot get him to sleep at home, what makes anyone think that the youth will do so for someone else. What basis is there for assuming that such a child will keep appointments with a voluntary agency.

Martin & Snyder, *supra* note 90, at 45.

179. District Judge Lindsay G. Arthur of the Juvenile Division, Hennepin County, Minnesota, has recently stated:

Despite the persistence with which the reformers ignore the facts, the reality is that juvenile courts now divert to voluntary treatment the majority of children brought before them. If the child—and often her or his family—*can* go elsewhere and *will* go elsewhere, most juvenile courts will send them elsewhere. In point of provable fact, almost all, if not all, juvenile courts divert every possible status offense case that comes before them. The average is more than half, far more than half. Nor are juvenile courts arguing that they should process more status offenders—they would gladly divert even more than they do now. But courts do argue for continued judicial authority to handle the residuum of juveniles who cannot or will not accept diversion; those children who need help but will not get it voluntarily.

Arthur, *Status Offenders Need a Court of Last Resort*, 57 B.U.L. REV. 631, 632 (1977) (citations omitted).

180. See Novak, *The Incurable Child Under the New Pennsylvania Juvenile Act: An Unsound, Unsupportable, and Unfortunate Policy Choice*, 35 U. PITT. L. REV. 73, 89 (1973).

Even if the critics of PINS jurisdiction are correct in their judgment that it has failed to achieve any significant benefits, abolition might nevertheless be a mixed blessing at best. For at least some children, the cure may be worse than the disease. As a number of observers have pointed out, in any number of cases the conduct which brings a child within the PINS jurisdiction of the juvenile court includes behavior which could also subject the child to the court's juvenile delinquency jurisdiction because it involves acts which would be criminal if committed by an adult.¹⁸¹ One view of this phenomenon is that it is an example of the misuse or abuse of PINS jurisdiction.¹⁸² It has been seen as particularly inappropriate in view of the fact that a proper adjudication of juvenile delinquency requires that constitutional due process protections be afforded to the respondent child, including the stringent requirement of proof beyond a reasonable doubt.¹⁸³ In PINS cases, this protection is not required in many jurisdictions and has not been held uniformly to be a constitutional requisite.¹⁸⁴

There is, however, another side to the coin. It is at least arguable that in some cases in which a juvenile delinquency charge is, as a technical matter, properly sustainable, a reduction to PINS would be appropriate and, at least from the child's point of view, desirable.¹⁸⁵ Whether a PINS petition replaces a juvenile delinquency charge as a result of a kind of juvenile court "plea bargaining" or by reason of the exercise of discretion by the court,¹⁸⁶ there may be, again from the viewpoint of the child, an important advantage. Despite the not infrequent claim that juvenile delinquents and children adjudicated as PINS are treated identically,¹⁸⁷ this is clearly not always the case. It promises to be less so in the future if we may judge by recent legislative developments.

181. See, e.g., *THE PINS CHILD: A PLETHORA OF PROBLEMS*, *supra* note 152, at 45; *JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, JUVENILE INJUSTICE 3* (1973); Burt, *supra* note 1, at 133; Polier, *supra* note 101, at 7.

182. See *IJA-ABA STANDARDS, NONCRIMINAL MISBEHAVIOR*, *supra* note 24, at 4; Rosenberg & Rosenberg, *supra* note 41, at 1115-16.

183. See text accompanying notes 15-16 *supra*.

184. See Rosenberg & Rosenberg, *supra* note 41, at 1118.

185. As one experienced juvenile court judge has noted:

Frequently, status offenses are used as a coverall, often because there is less stigma to incorrigibility than there is to a criminal label. If a child runs away from home and steals a car to get on his way, he often will be charged with absenting instead of car theft. If he applies for a job later and the juvenile record is revealed, he's much more likely to be refused the job if larceny shows on the record than if it shows only running away from home. Because plea bargaining is becoming an ingrained American institution, the car theft can be bargained away for an admission to absenting; the range of dispositions is the same; the public is equally protected and the child is less stigmatized.

Arthur, *supra* note 142, at 6.

186. Under the New York Family Court Act, for example, at any time during a juvenile delinquency proceeding the court may, on its own motion, substitute a PINS petition for a juvenile delinquency petition. N.Y. FAM. CT. ACT (29A) § 716 (McKinney 1975).

187. See, e.g., *IJA-ABA STANDARDS, NONCRIMINAL MISBEHAVIOR*, *supra* note 24, at 5; Gilman, *supra* note 24, at 49; Gough, *supra* note 123, at 272.

Pursuant to the provisions of the federal Juvenile Justice and Delinquency Prevention Act of 1974,¹⁸⁸ financial assistance to states in developing and implementing delinquency prevention programs is conditioned upon the submission of plans that bar the placement of PINS children in juvenile detention or correctional facilities and mandates that such placements be in shelter facilities.¹⁸⁹ The legislative response of the State of New York to the federal enactment may prove to be prototypal, for New York has eliminated the placement of PINS children in training schools and secure detention facilities operated by the State Division for Youth.¹⁹⁰

Even if this legislation is regarded as beneficial to children adjudicated as PINS offenders, it does not come without a price. At the same time that the New York legislature was "deinstitutionalizing" PINS offenses in order to ensure that the state would continue to receive federal financial assistance for its delinquency prevention programs, it was also accelerating the trend toward more severe dispositions for certain adjudicated juvenile delinquents. The state's Juvenile Justice Reform Act of 1976,¹⁹¹ which enacted a number of definitional and procedural changes with respect to juvenile delinquency jurisdiction, most importantly provides not only for significantly increased periods of confinement, but also mandates specific periods of secure confinement for fourteen- and fifteen-year olds who have been adjudicated juvenile delinquents by reason of having committed certain "designated felony acts."¹⁹² Although the severe dispositions authorized by the Act are limited to serious or violent juvenile offenses, it would be incautious to rule out the possibility that an increasingly harsh view will be taken of delinquency in general.

If this speculation is correct, it may very well be that even deinstitutionalization of PINS, apart from the radical step of eliminating it from the jurisdiction of juvenile courts altogether, is not, from the standpoint of the misbehaving or offending child, entirely a benefit. It is not difficult to imagine, for example, one possible response when the police encounter a child wandering the streets at all hours of the night, or are summoned by a parent to deal with a child who is violently out of control.

188. Pub. L. No. 93-415. See Bayh, *New Directions For Juvenile Justice*, TRIAL, February, 1977, at 20.

189. 42 U.S.C. § 5633(12) (1974).

190. N.Y. EXEC. LAW. §§ 501, 510, 511 (McKinney Supp. 1977).

191. 1976 N.Y. Laws, c. 878. See Comment, *The New York Juvenile Justice Reform Act of 1976: Restrictive Placement—An Answer to the Problem of Seriously Violent Youth?* 45 FORDHAM L. REV. 408 (1976). For a brief and highly critical appraisal of the Act, see Cohen, *Juvenile Justice: New York's Act Is Hard To Follow*, TRIAL, February, 1977, at 28.

192. N.Y. FAM. CT. ACT. (29A) § 712 (McKinney Supp. 1978). See Gadbois & Black, *1976 Amendments to the Juvenile Court Law: Adult Treatment of 16-17 Year Old Offenders*, 9 U.W.L.A. L. REV. 13 (1977), which describes similar legislative developments in California as "a frankly political compromise, in which a theoretically tougher approach to the problem of serious juvenile crime was adopted in return for a sharp curtailment of the quasi-criminal aspects of the handling of status offenses." *Id.* at 14 (footnotes omitted).

A policeman facing a situation where even temporary detention is not authorized may choose the obvious alternative of lodging a form of cover charge¹⁹³ such as harassment, resisting arrest or the like, available under the court's juvenile delinquency jurisdiction, as a basis for detaining the child, and thereby at least resolving the immediate problem.¹⁹⁴ In sum, the removal of PINS from the jurisdiction of the juvenile court, rather than eliminating old problems, may create new ones.

V. CONCLUSION

Not unlike other legal responses to societal problems, PINS jurisdiction has clearly fallen far short of resolving the problem it was created to address. Nevertheless, as the writers of one early commentary on PINS observed:

While simply removing the court's jurisdiction over the ungovernable child may have a certain seduction as a temporary answer, we seriously doubt that it would work any ultimate resolution. There will obviously remain cases where the child simply can't "make it" at home, in which judicial action will be required.¹⁹⁵

These words are no less true today that at the time they were written. In view of the considerations outlined above, it would be precipitate to abandon altogether the resources and expertise, however limited, which have developed over the years in attempting to deal with noncriminal misbehavior by children, in the absence of alternatives which promise greater success.

193. Cf. P. CHEVIGNY, *POLICE POWER* 136-41 (1969) (describing in detail a police practice of covering street abuse by arresting the victim and lodging charges such as harassment, disorderly conduct or resisting arrest).

194. There are, of course, cases in which a child's conduct, however viewed, will not satisfy the elements of juvenile delinquency. A frequent suggestion is that many PINS cases ought to be handled under the child neglect jurisdiction of juvenile courts. See Note, *supra* note 24, at 1393. Before seizing upon this alternative, however, one should consider the implications for the rights of parents. It has been suggested that the due process afforded the respondent in a neglect proceeding ought not to be as extensive with that required in a delinquency proceeding. See Becker, *Due Process and Child Protective Proceedings: State Intervention on Behalf of Neglected Children*, 2 CUM.—SAM. L. REV. 247, 260-61 (1971); Levine, *Caveat Parens: A Demystification of the Child Protection System*, 35 U. PITT. L. REV. 1, 2 (1973). There are impressive arguments to the contrary. The author of an article prepared under the auspices of the IJA-ABA Juvenile Justice Standards Project argues that the neglect jurisdiction of the juvenile courts should be narrowed. Wald, *State Intervention On Behalf of "Neglected" Children: A Search For Realistic Standards*, 27 STAN. L. REV. 985 (1975). When a child is charged with delinquency, Wald would permit neglect charges to be lodged only in cases in which the parent had directly caused the child's delinquent conduct. *Id.* at 1036.

195. Gough & Grilli, *The Unruly Child and the Law: Toward a Focus on the Family*, 23 JUV. Jt'ST. 9, 12 (1972).